IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1942

WILLIAM L. MURRAY, As Agent for and on Behalf of JAMES REDDICK, and Others Similarly Situated, *Petitioner.* vs. NOBLESVILLE MILLING COMPANY, a Corporation, *Respondent.*	No. .....

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The opinions in this case are set forth in the petition for Writ of Certiorari at page 2.

JURISDICTION

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction is set out in the petition for the Writ of Certiorari at pages 2, 3.

STATEMENT OF THE CASE

A full statement of the case having been given in the petition for Certiorari for brevity is not here repeated.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in each of the following particulars:

1. In holding that the pay arrangement allegedly entered into October 18, 1938, between respondent and its employees, conformed to the legal requirements of Section 7 of the Fair Labor Standards Act of 1938.

2. In holding that the decision of this Court in the case of Walling v. Belo Corp., 316 U. S. 624, was controlling in the instant case.

ARGUMENT

A.

In support of the first question presented petitioner respectfully points out that:

This Court in the case of Overnight Motor Transportation Co., v. Missel, 316 U. S. 572, has clearly established that the Fair Labor Standards Act of 1938, was intended, not only to raise sub-standard wages, but to discourage excessive hours of employment through the establishment of penalty rates for overtime, that is to say, under section 7 of the Act, an employer desiring to work his employees longer than the maximum hours established therein must compensate them at time and one-half for such overtime hours upon their regular rate of pay rather than the legal minimum rate as established by section 6 of said Act. As was pointed out in this decision no difficulty is encountered by courts or litigants in determining regular rate of pay when the employee receives, a straight hourly wage, a fixed weekly salary for a fixed number of hours of work, or a fixed salary for a fluctuating work-week, for in these instances all that it is necessary to do is to divide the number of hours worked into the salary paid.

The simplicity in determining the regular rate of pay in the instant case, is quite as easy if any reference is made to the transcript, for the purpose of scrutinizing the facts surrounding the alleged pay arrangement which respondent employed in keeping its time books. It will readily be observed in this case that respondent's weekly time book (Exhibit No. 1, of Stipulation No. 1) reflects the establishment of a purported new basic rate of 34 cents an hour, in most instances, with time and one-half for overtime hours, computed at 51 cents (R. 16) and since this arrangement would not equal the employees old rate of pay at 40 cents an hour as established by oral contract and wage payments, the respondent guaranteed its employees a "bonus" or "gratuity" (R. 33) in all instances where they worked less than 62 hours each week. This "bonus" or "gratuity" ranged from an approximate minimum of .09 cents in the case of 61 hours work (40 hrs. x .34 = $13.60, 21 hrs. x .51 = $10.71 + .09 = $24.40) to a maximum of $2.40 in the case of 40 hours (40 hrs. x .34 = $13.60 + $2.40 = $16.00) and upon employing the "bonus" or "gratuity" in every instance to and including 61 hours of labor the employee received for his week's pay the sum of his hours worked multiplied by his old rate of pay, which in most instances was 40 cents an hour. In other words, this so-called "bonus" placed a higher premium on the fact that the employee worked less hours, so that in truth the "bonus" was no more than an equalizing factor to bring the employee up to the former established rate of pay.

From a cursory examination of the record, relying upon the bona fides of the alleged contract or any other theory which the facts might support, it can readily be seen, that although on its face the pay roll record purports to disclose a different state of facts, it amounts to nothing more

or less than a guarantee on the part of respondent to the employees of 40 cents an hour, and with the regular rate of pay thus established it necessarily follows that the employees effected by the reversal in the decision of the Circuit Court of Appeals, have not been compensated at one and one-half times their regular rate of pay in compliance with section 7 of the Act.

This bonus plan and the intent accompanying its adoption by the respondent, brings this case clearly within the factual situation of Carleton Screw Products Company vs. Fleming, 126 F. (2d) 537, decided on March 20, 1942. In that case it was the desire of the officers of the Carleton Company to reduce the rate of each employee's pay before the effective date of the Act and still maintain their old rate of pay. The means which were there employed are in substance the same as in the instant case. The court in disposing of the Carleton case said, "it is necessary to determine what was the regular rate of compensation. The trial court found that regular rate was the agreed rate, plus the so-called bonus or gratuity paid at the end of each week. The purpose of this so-called bonus or gratuity was to maintain the wage rate at the same level as existed at and prior to September 1, 1938. The entire purpose of the plan was to escape paying overtime on the basis of that rate. The bonus has none of the earmarks of a bonus, but it was in fact a part of the employees' compensation" and proceed to affirm the granting of injunction under section 16 (a) of the Act.

Following this same line of reasoning Judge Wilson, of the United States District Court for the Northern District of Texas, in the case of McLendon et al., vs. Bewley Mills, decided December 10, 1940, in an oral opinion reported in 1 W. & H. Cases 934, stated in part: "I am of the view that the agents of the Government were correct in their construction, and that the plan, as mapped and outlined by the

defendant to its employees, as to the rate of pay, system of pay, etc., was not in compliance with the law. That it merely had the appearance of being so in certain particulars but in its aggregate substance was not. Without elaborating, that conclusion appears to me to be obviously correct because the time and a half for overtime paid under that twenty-five cent minimum pay would not be on the basis of the actual per hour wages of those men under that same arrangement. But, on a fictional basis, you might say of a minimum of twenty-five cents per hour.

"The additional compensation above the twenty-five cents per hour, which defendant provided, would make the compensation of these men approximately what it was before. In figuring whether it was in compliance with this law you must take the aggregate of that compensation, the minimum of twenty-five cents an hour, with such additional compensation and figure the per hour wage on that basis.

So, in the instant case respondent meant to and did create with its employees at the employee meeting a factual situation very identical with that existing in the Carleton and Bewley Mills cases. This was accomplished when Jenkins advised them that they would continue to receive 40 cents an hour (R. 18, 21, 23, 24) for all hours less than a full week's work. This fact cannot be changed merely because respondent saw fit to revise its bookkeeping system to show a formal fictitious compliance with the Act. In this connection it should be remembered that this respondent subsequently engaged other employees and advised them that their rate of pay would be 40 cents an hour (R. 25) although Exhibit No. 1, of Stipulation No. 1, shows that their wages were computed in the very same manner as those employees engaged prior to the effective date of the Act. It is equally clear that respondent recognized that its purported scheme did not constitute a bona fide change in the rates. It was

frankly admitted by respondent's witnesses that its proposal "was a matter of bookkeeping" (R. 32) that the figures of 34 cents and 51 cents were reached by "simple arithmetic" (R. 39) and that the "bonus" granted to bring the earnings at the new rate up to earnings at the former rate "was a misnomer" (R. 33) since it was not in any respect related to the amount or type of work performed, or any of the other common elements which generally influence changes in rates of pay (R. 38).

The mere fact that the guaranteed rate of 40 cents an hour in this case is greater than the minimum established by section 6 of the Act, is of no avail to this respondent for it is now well established that the "Act requires payment for overtime at time and a half the regular pay where that pay is above the statutory minimum as well as where it is at the minimum." Overnight Motor Transportation Co. v. Missel, 316 U. S. 572; See Also—Bumpus v. Continental Baking Co., (C. C. A. 6) 124 F. (2d) 549; Warren-Bradshaw v. Hall, 63 Sup. Ct. 125; Floyd v. DuBois Soap Co., 63 Sup. Ct. 159; Mid-Continent Pipe Line Co. v. Hargrave, (C. C. A. 10) 129 F. (2d) 655.

B.

In support of the second question presented, petitioner would show that:

No criticism is made of the decision in the case of Walling v. Belo Corp., 316 U. S. 624, but contention is made that the principles therein enunciated are not and cannot be controlling in the instant case as is stated by the decision of the Circuit Court of Appeals. In the case at bar the employees were not guaranteed a stated specific wage each week, but only received a sum equal to the hours worked multiplied by 40 cents an hour in all instances below 62 hours as has been hereinbefore pointed out. By respondents plan, which

the District Court held wasn't submitted in good faith, the employee Mack Cook, a typical employee, received $6.00 for 15 hours labor, $8.40 for 21 hours labor, $12.00 for 30 hours labor, $18.00 for 40 hours labor, etc., and it was only when he worked longer than the 62 hours required under respondent's revised plan of bookkeeping that the 51 cents an hour overtime rate reflected any change in the total amount of his weekly pay as is shown by the pay-roll computation for the week of November 4, 1938, (R. 16). In the Belo case the typical employee was, under and pursuant to the written terms of a bona fide contract, guaranteed a stated sum of $40.00 each week irrespective of the number of hours he might work in any work week up to and including a fixed maximum number of hours. In addition to this liberal policy of payment to assure the employee enough money to pay his bills at the end of each week, the Belo corporation went much further, as it is so aptly set forth in the decision of that case, by granting its employees two weeks vacation each year at full pay, special bonuses, full pay during periods of illness (sometimes for months), absences to attend to personal affairs, life insurance, and other benefits which inured to their general well being.

These factors do not appear in the instant case as there was no guaranteed weekly wage payment, nor were there any employee benefits accruing in addition to the wage payments.

By the proposed plan herein respondent's employees were to be guaranteed an hourly rate of pay, but yielding the same weekly compensation for the same number of hours worked by use of the payment of the so-called "bonus" or "gratuity," (R. 16). The evidence of the employees at the trial reveals that they did not understand the nature or the terms of this pay arrangement (R. 19, 22, 23) and the trial court found this in its findings of fact. This is further evi-

denced by the fact that the employees received their old rate of pay in their pay envelope without any showing as to the manner in which same was computed (R. 19), and the fur- their fact that new employees were hired by the respondent at the 40 cents an hour rate although the company pay-roll record revealed the use of the lower rate of pay, together with the "bonus" or "gratuity" in recording upon its payroll the total compensation paid to such new employees. A still further fact lending to the confusion in the mind of the employees was that they were instructed to tell inquirants that they were paid 40 cents an hour with time and one-half overtime (R. 18, 23, 24). It is clear from the record in this case that there was no express understanding with the employees as to a new rate of pay, nor was there any weekly guarantee as to total weekly earnings except that if the employee worked the full workweek of 60 hours, which was not necessarily the rule, he received the same amount that he formerly received, but if he worked fewer hours he was paid the old rate of 40 cents an hour. Certainly, seasonal fluctuations in the hours of employment would lend nothing but confusion to the mind of the employee as to the rate of pay in the light of these facts. Surely, the acceptance by the employees of pay under the alleged new pay arrangement could not lend the virtues of an express contract where there was no mutual understanding as to its terms.

> See Warren-Bradshaw Drilling Co. v. Hall et al., 63 Sup. Ct. 125; Burgess v. Phillips Petroleum Co. (June 14, 1942, Kans. D. C. Russell Co.), 5 W. H. R. 606.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of Certiorari and there-